No. 02-25

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In The
# Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

*Petitioner,*

v.

YI QUAN CHEN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals relied upon and applied the proper scope and standard of judicial review when it overturned a determination by the Board of Immigration Appeals (BIA) that respondent did not testify credibly when seeking asylum and withholding of removal from the United States.

2. Whether the court of appeals erred when, after reversing the BIA's determination that respondent was not credible, the court, based on the administrative record as a whole, found that respondent was eligible for asylum and entitled to withholding of removal from the United States, rather than remanding the case to the BIA.

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Yi Quan Chen ("Chen") respectfully opposes the government's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions cited and reproduced by the government, this case involves 8 C.F.R. 208.13(b)(2) and (3) and 8 C.F.R. 208.16(b)(2) and (3), 208.16(c), 208.16(d) and 208.18, which are reproduced *infra* in Respondent's Appendix ("Resp. App.").

## RESPONDENT'S COUNTERSTATEMENT OF LAW

Respondent agrees with the government's statement of the relevant statutory and regulatory framework of this case, except for its omission of 8 U.S.C. 1101(a)(42)(B), which amended the Immigration and Nationality Act to include as a ground for asylum the "resistance to a coercive population control program," and is at the core of this case.[1]

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[1] In addition, 8 C.F.R. 208.16 and 208.18 are relevant because, in the proceedings below, respondent also sought withholding of removal under the Convention Against Torture. The agency rejected this claim, and the court of appeals, in granting withholding of removal, did not specifically invoke the Convention Against Torture. Accordingly, respondent seeks to preserve this issue in the event that this Court decides to remand the case.

## RESPONDENT'S COUNTERSTATEMENT OF FACTS

Chen, a citizen of the People's Republic of China, grew up in a rural village in Fujian province. E.R. 79, 160. On October 5, 1994, Chen, then twenty years old, married Ai-Ling Jiang, then age nineteen. Their marriage was not legally recognized because the couple married younger than the law allowed. *Id.* 82, 85. Therefore, they could obtain neither a marriage permit, nor a birth-allowed permit. *Id.* 85-87. In China, when a woman becomes pregnant without such permits, her pregnancy violates the law. *Id.* 181-186. Chinese family planning officials frequently punish those who violate these policies by such methods as the use of physical force, detention, coerced abortion, sterilization, exorbitant fines, and property destruction. *Id.* 86, 178-186. Those who seek to evade punishment often go into hiding in China, or if they can, leave the country and seek refuge elsewhere. *Id.* 186-187. Chen's wife became pregnant in February 1995. Family planning officials attempted to detain the Chens because the couple did not have the requisite permits. Chen's parents intervened, allowing the Chens to flee. *Id.* 86. To elude the authorities, the couple stayed with different relatives. Family planning officials persisted in their pursuit, repeatedly visiting the home of Chen's parents searching for him. On one occasion, Chen returned home, and discovered family planning officials waiting for him. Chen then hid in his aunt's home. *Id.* 88-91.

In the spring of 1995, immigrant smugglers helped Chen flee to the United States where he was placed in INS detention. *Id.* 92-93, 126. While he was in the U.S., Mrs. Chen received a notice requiring her to submit to an abortion. *Id.* 220. She subsequently gave birth to their son. To evade family planning officials, Mrs. Chen and the child have continued to change residences often. *Id.* 102, 120-121. Chen's lawyer prepared an asylum application based on pro-democracy grounds, instructing him not to mention that Chinese authorities sought him for his violation of

China's marriage and family planning laws, because if he did so, he would "have less chance to win" his case. *Id.* 130. The IJ denied Chen's 1995 claim, and in 1996, INS deported him to China. *Id.* 93-94.

Chinese officials apprehended Chen at the Shanghai airport and placed him in a detention center. *Id* 127. They beat him so severely that he required hospitalization, and now bears a scar on his forehead. *Id.* 95-99, 129. Chen escaped after approximately one month in the detention center's hospital. He learned that the Chinese government had issued notification of his escape, and moved around a lot to avoid capture. When he called home, his family told him to stay away because family planning officials and the police were searching for him. *Id.* 99-102. Government agents ransacked the home of Chen's parents and detained them looking for Chen and his wife. *Id.* 200. During this time, Chen saw his wife and son from a distance once, for just a few minutes. He stayed away from them because he feared for their safety. *Id.* 103, 121.

Chen again fled to the U.S. in 1998. *Id.* 105. The INS detained him, holding him until he was granted withholding of removal in the fall of 2001. Resp. App. 17a. Chen filed for asylum and withholding of removal, including withholding under the Convention Against Torture. Pet. App. 57a. Evidently reassured by his new counsel that it was permissible to discuss his violations of China's marriage and family planning laws, Chen focused on those areas in his 1998 application. *See, e.g., id.* 130, 168. He submitted detailed country conditions evidence, admitted in the administrative record, which confirms that the Chinese government harshly punishes individuals who resist coercive family planning practices, including those who marry before the government-mandated age and disregard abortion requirements. *Id.* 181-187. Chen does not speak English, and testified at his asylum hearing through a translator via telephone. *Id.* 69, 71-72, 95-96. The IJ and BIA determined that Chen had not testified credibly, and denied relief. These decisions, and the court

of appeals' reversal will be discussed in the context of the arguments below.

## ARGUMENT

### I. THE COURT BELOW CORRECTLY RELIED UPON AND APPLIED WELL-ESTABLISHED RULES FOLLOWED BY OTHER CIRCUITS GOVERNING THE SCOPE AND STANDARD OF REVIEW WHEN IT REVERSED THE BIA'S ADVERSE CREDIBILITY DETERMINATION.

1. The court of appeals employed the proper legal standard in reviewing the BIA's conclusion that respondent's testimony was not credible. As the court correctly stated, factual findings of the BIA "will be upheld on review unless 'any reasonable adjudicator would be compelled to conclude to the contrary.'" Pet. App. 4a (quoting 8 U.S.C. 1252(b)(4)(B)). *Accord INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). The court held that this standard, although deferential, requires that the BIA have a "legitimate articulable basis to question the [applicant's] credibility" and "a specific, cogent reason for any stated disbelief." Pet. App. 4a. Consequently, "minor discrepancies, inconsistencies, or omissions that do not go to the heart of an applicant's asylum claim" do not constitute substantial evidence. *Id.* Other courts of appeals also require that an adverse credibility determination by the BIA be supported by "substantial evidence" and "specific, cogent reasons" that "bear a legitimate nexus to the finding." *See, e.g., Gailius v. INS*, 147 F.3d 34, 44, 47 (1st Cir. 1998); *Balasubramanrim v. INS*, 143 F.3d 157, 162 (3d Cir. 1998); *Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989); *Mansour v. INS,* 230 F.3d 902, 906 (7th Cir. 2000); *Hamzehi v. INS,* 64 F.3d 1240, 1242 (8th Cir. 1995). Similarly, other circuits hold that although the substantial evidence standard is deferential, deference "is not due" when the BIA's factual findings are based on "inferences or presumptions that are not reasonably grounded in the record, viewed as whole." *Cordero-Trejo v.*

*INS*, 40 F.3d 482, 487 (1st Cir. 1994). Adverse credibility determinations based on minor discrepancies, inconsistencies or omissions that do not go to the heart of an applicant's asylum claim cannot constitute substantial evidence. *See Bojorques-Villanueva v. INS*, 194 F.3d 14, 16 (1st Cir. 1999); *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998). *See also Alvarado-Carillo v. INS*, 251 F.3d 44, 56 (2d Cir. 2001) (finding that a plausible explanation may suffice to overcome minor inconsistencies); *Asylum Officer Basic Training Workbook*, *"Credibility,"* (March 1999) at 12, 27 (minor discrepancies that do not directly bear on material aspects of an asylum claim cannot undermine an applicant's credibility). The Ninth Circuit has followed these standards for more than fifteen years, *see, e.g., Mosa v. Rogers*, 89 F.3d 601, 604 (9th Cir. 1996); *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986); and did so in the instant case.

In addition to crafting these standards, the courts of appeals not only shaped uniform rules for reviewing adverse credibility determinations in asylum claims, but also effectuated the humanitarian purpose of the Refugee Act of 1980, which governs asylum cases.[2] *See, e.g.*, 55 Fed. Reg. 30674, 30675 (July 27, 1990) (explaining that the Refugee Act reflects "a fundamental belief that the granting of asylum is inherently a humanitarian act distinct

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[2] Such an approach is also mindful of the unusual circumstances that an asylum applicant typically confronts, each of which was faced by respondent during the asylum process: fear and disorientation; detention; unfamiliarity with the language, culture, and legal system in the United States; absence of control over obtaining evidence; and the obligation to testify at his hearing through a non-court certified translator by telephone. *See* INS, *Asylum Officer Basic Training Workbook, "Credibility"* at 6-11; D. Anker, *Determining Asylum Claims in the United States: A Case Study on Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433 (1992/1993).

from the normal operation and administration of the immigration process"); *Report of the U.S. Senate Judiciary Committee*, S. Rep. No. 96-256, at 1 (1980) *reprinted in* U.S.C.C.A.N, 141 ("The Refugee Act gives statutory meaning to our national commitment to human rights and humanitarian concerns, not reflected in the Immigration and Nationality Act of 1952 as amended"); *Matter of Pula,* 19 I & N Dec. 467, 476 (BIA 1987) (Heilman, concurring) (stating that "asylum provisions are humanitarian in their essence and indeed recognize that the forces which impel persons to seek refuge may be so overwhelming that the 'normal' immigration laws cannot be applied in their usual manner."). As this Court recognized in *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987), the Refugee Act is especially important because the "harsh measure" of deportation is "all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."

2. While the court in *Chen* properly followed the rules adopted by other circuits for reviewing an adverse credibility determination in an asylum case, the government nevertheless cites four cases that it claims conflict with the decision, and with the Ninth Circuit's approach generally. *See* Pet. 20. These cases, however, demonstrate nothing of the sort.

In *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000), the court affirmed the BIA's adverse credibility determination based on "significant" discrepancies in the alien's application "which were central to the respondent's claim." *Id.* at 906. The Seventh Circuit applied precisely the same standard employed in this case: an adverse credibility determination will be upheld if supported by "specific, cogent reasons" (*id.; compare* Pet. App. 8a), including discrepancies that "go to the heart of" (Pet. App. 8a) or are "central to" (*Mansour*, 230 F.3d at 906) the applicant's asylum claim. The fact that the BIA's adverse credibility determination was upheld in *Mansour* and reversed in this

case does not demonstrate a "conflict with other courts of appeals" (Pet. 20) as to the appropriate standard of review.

As in the instant case, in *Bojorques-Villanueva v. INS*, 194 F.3d 14 (1st Cir. 1999), the court independently evaluated each ground the BIA cited as a basis for finding the applicant incredible. The court articulated a standard virtually identical to the one set forth by the Ninth Circuit in *Chen*, namely, that "an adverse credibility determination cannot rest on trivia but must be based on discrepancies that 'involved the heart of the asylum claim.'" *Id.* at 16 (quoting *De Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997)). Similarly, *Rucu-Roberti v. United States Department of Justice, INS*, 177 F.3d 669 (8th Cir. 1999), upheld the BIA's denial of eligibility for asylum and withholding of deportation on the grounds that the applicant "failed to present a consistent account of what allegedly had happened" and that the applicant's testimony was "not detailed, consistent, and believable." *Id.* at 670. While *Rucu-Roberti* contains no discussion of the standard for reviewing a BIA adverse credibility determination, it was decided on the same standard as the case at bar: whether discrepancies were central to the merits of the applicant's claim.

The government misperceives the Fifth Circuit's decision in *Chun v. INS*, 40 F.3d 76 (5th Cir. 1994). In *Chun*, the court declared that it "will not review decisions turning purely on the immigration judge's assessment of the alien petitioner's credibility." *Id.* at 78. The Fifth Circuit's perspective therefore differs from every other court of appeals to consider the issue because its deference to the BIA's credibility findings is not "substantial" but total. Such an approach violates the standard for reviewing factual findings enunciated by this Court in *Elias-Zacarias*, and codified by Congress in 8 U.S.C. 1252 (b)(4)(B). The instant case is not an appropriate vehicle to review the conflict between the Fifth Circuit and every other court of appeals over whether courts should *ever* overturn a BIA adverse credibility finding, since the

government's petition does not appear to defend the extreme position taken in *Chun*.

3. The government contends that the court of appeals erred in "treating each inconsistency or gap in Respondent's evidence as an isolated defect" and "failing to consider that evidentiary defects may carry cumulative significance" with respect to assessing an applicant's credibility. Pet. 18-20. This criticism is not justified in the asylum context. For example, in *Cordero-Trejo,* 40 F.3d at 488-491, the First Circuit separately evaluated each of the ten grounds the BIA cited as indicative of the applicant's lack of credibility, and vacated the BIA's negative credibility ruling because none of the bases was supported by substantial evidence. The INS' own *Asylum Officer Basic Training Workbook on Credibility* (at 28) teaches that "[n]on-material falsehoods cannot be added together to find the applicant ineligible for asylum." Consequently, the government's proposed cumulative approach is not appropriate in this case, because the grounds upon which the BIA relied in making its adverse credibility determination are immaterial to the elements of the asylum definition.[3]

The government nonetheless cites *United States v. Arvizu,* 122 S. Ct. 744 (2002) in an effort to bolster its "cumulative evidence" position. Pet. 19. In *Arvizu*, a criminal caseinvolving suppression of evidence, and having nothing to do

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[3] Contrary to the government's argument (Pet. 19, n.7), such a calculation is entirely different from that governing the evaluation of whether harmful acts amount to persecution. The cumulative approach to assessing whether harm amounts to persecution involves consideration of whether several instances of lesser harms together rise to a level of harm that constitutes persecution. *See, e.g., In re I.Z. and O.Z.*, 22 I. & N. Dec. 23 (BIA 1998). The difference is that in the context of analyzing credibility, the cumulative approach improperly aggregates faulty evidentiary determinations, while the cumulative approach to evaluating whether individual harms to the applicant collectively amount to persecution, aggregates probative evidentiary considerations.

with asylum, this Court held that based on precedent in "reasonable suspicion" traffic stop cases, a law enforcement officer could consider that the totality of the circumstances warranted further investigation. 122 S. Ct. at 751-752. *Arvizu* is thus inapposite to a review of BIA adverse credibility determinations in asylum cases. Consistent with the humanitarian nature of the Refugee Act, the courts, the BIA, and the INS have developed well-settled rules appropriate to reviewing credibility issues involving asylum applicants. These rules, explained above, are necessarily different than those appropriate to traffic stop cases. Moreover, the temporal context of a traffic stop decision is distinct from that of a credibility determination in an asylum case. In a traffic stop, a law enforcement agent must make a quick judgment based on his overall impression of the circumstances in order to decide whether further investigation of possible criminal activity is appropriate. In an asylum case, by contrast, the IJ and the BIA have more time to examine each circumstance so that a quick "totality of the circumstances" impression to assess credibility is not necessary for proper enforcement of the relevant laws.

4. The government argues that the court of appeals' decision in this case is part of a "pattern of overreaching" (Pet. 16) by the Ninth Circuit in its review of the BIA's adverse credibility findings in asylum cases. However, most of the government's quarrel with this "body of circuit law" (Pet. 14) is not presented in this case. The petition criticizes and cites with disapproval *Abovian v. INS*, 219 F.3d 972 (9th Cir. 2000), which held that the BIA may not consider an applicant's failure to support his claim with documentary proof if the applicant testifies credibly. *See* Pet. 13, 14, 16, 18, 24. Not only does petitioner fail to explain what *Abovian* has to do with the instant case, where respondent did, in fact, submit documentary evidence to corroborate his claim (E.R. 169-203), but the BIA also did not address this issue in its opinion. Similarly, *Chen* is not an appropriate vehicle for this Court to review *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000), since the court

below relied on *Shah* only as an alternative (and less important) ground for its conclusion that respondent's birth records were irrelevant to respondent's credibility. In *Chen,* the court instead rested its determination primarily on the ground that the BIA majority had ignored the long-standing rule that "if discrepancies 'cannot be viewed as attempts by the applicant to enhance his claims of persecution [they] have no bearing on his credibility.'" Pet. App. 7a-8a, *citing Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986). The government's critique of *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) is equally misplaced since the Ninth Circuit in this case does not even cite *Bandari*. Finally, the government purports to seek review of a "body of circuit law that relieves the applicant of his burden of proof in asylum cases." Pet. 14. Yet petitioner fails to explain how the court of appeals, by applying well-established principles of judicial review of adverse credibility findings to this case – principles followed by other circuits in asylum cases – has improperly shifted the applicant's burden of proof.[4]

5. In concluding that the three bases the BIA cited could not constitute substantial evidence to support an adverse credibility ruling, the Ninth Circuit not only followed long-settled rules, it correctly applied them to the facts of this case.

*Counterfeit birth certificates:* The court of appeals properly concluded that there was no substantial evidence to support the BIA's view that the submission in respondent's first asylum case of counterfeit notarial birth records with

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[4] The case at bar does not conflict with *Mejia-Paiz v. INS*, 111 F.3d 720 (9th Cir. 1997), despite the government's suggestion to the contrary. Pet. 15, n.4. *Mejia-Paiz* correctly states that the asylum applicant "bears the burden of persuading the IJ that his evidence is credible." *Id.* at 722. In contrast to *Chen*, however, *Mejia-Paiz* involved discrepancies that "are not minor," not explained, and went to the heart of the applicant's asylum claim. *Id.* at 723-724.

an incorrect birth year undermined his credibility. Pet. App. 8a. First, those certificates were offered to determine whether respondent should be classified as a juvenile or adult for purposes of INS detention, a matter wholly collateral to the asylum claim. *See* E.R. 155, 157 ("Report needed for custody determination. Juvenile vs. adult."). Second, respondent testified that he did not know the certificates were fraudulent and had not noticed the discrepant birth year; he explained that family members had obtained them, and that somebody evidently made a mistake. *Id.* 110-113.

"Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding." *See, e.g., Senathirajah*, 157 F.3d at 221 (3d Cir. 1998) (quoting *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988)). Similarly, a plausible explanation can overcome minor discrepancies. *Alvarado-Carillo*, 251 F.3d at 56, citing with approval *Abovian,* 219 F.3d at 979. Where such a date discrepancy is attributable to mistakes by persons other than the applicant – as occurred in the instant case (*see* Pet. App. 7a) – it may be disregarded. *Zubair v. INS,* 191 F.3d 458 (7th Cir. 1999) (unpublished). The BIA itself has recognized that a fraudulent document presented for matters incidental to claims of persecution does not undermine an applicant's credibility because it does not go the heart of his asylum claim. *In re O.D.*, 21 I. & N. Dec. 1079, 1081-82 (BIA 1998). The court of appeals therefore correctly found that since the birth certificates did not "enhance [respondent's] claims of persecution" or "reveal [anything] about his fear for his safety," and because respondent had provided a logical explanation, the BIA improperly discredited respondent on that basis. Pet. App. 8a-10a.

The government also attempts to paint the court of appeals' decision on this issue as "absurd[]" (Pet. 18) and "plainly wrong" (Pet. 17) by citing an interrogation manual for the proposition that a witness's entire testimony can be

discredited if a witness lies on any point, "no matter how irrelevant it may at first appear." Pet. 17 (quoting Jeffrey L. Kestler, *Questioning Techniques and Tactics* § 1:22 (3d ed. 1999)). But the BIA's reasoning in *In re O.D.* plainly illustrates why, whatever the merits of Kestler's technique in an interrogation, the principle does not apply across the board in asylum cases.[5]

*Inconsistencies between the two applications:* The court below also correctly concluded that the two inconsistencies cited by the BIA between respondent's 1995 and 1998 asylum applications were irrelevant to the question of credibility. The BIA determined that because, unlike the 1998 application, "respondent's 1995 application did not mention coercive population control as a basis of relief," the two applications were "inconsistent * * * with respect to critical aspects of respondent's claim." Pet. App. 20a-21a. But, as the BIA itself noted in setting aside the IJ's determination that the asylum petition was frivolous, this omission was reasonable, given that resistance to China's population control policies was not a viable basis for an asylum claim in 1995. It was not until 1996, when Congress enacted Section 601 of IIRIRA, now codified at 8 USC 1101(a)(42)(B), which made "resistance to a coercive population control program" a ground for asylum, that respondent could seek asylum based on his defiance of China's family planning policies. Pet. App. 22a-24a. The BIA further recognized that "the respondent testified at [his 1999] hearing that in 1995 he suffered persection (sic) on account of *both* his political activities and his violation of coercive population control policies." *Id.* at 23a. (emphasis in

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[5] *In re S.M.J.* also illustrates why the government's endorsement of Kestler's interrogation approach is misplaced in the asylum context. 1997 BIA LEXIS 3,*4 (recognizing that because "this Board, the Immigration Judges, and the Immigration and Naturalization Service are all bound to uphold [the international obligations incorporated into the Refugee Act] * * * a "cooperative approach" is appropriate.)

the original). Noting the BIA's inexplicably inconsistent treatment of this issue, the court of appeals correctly concluded that respondent's "observance of immigration law" could not constitute "a basis for finding him not to be credible." Pet. App. 9a.

The government's citations (Pet. 17-18) to *Jencks v. United States*, 353 U.S. 657, 667 (1957) and *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) are misplaced. Both *Jencks* and *Jenkins* were decided in a criminal law context completely divorced from the circumstances of this case. Nothing in *Jencks* addresses the proper means of analyzing the circumstances under which previously made statements are in fact probative of a current credibility determination in any context, let alone in an asylum case. The issue in *Jenkins*, the constitutionality of the use of pre-arrest silence to impeach a criminal defendant, has nothing to do with the matter at bar. The *Jenkins* Court noted that a witness could be impeached by his "previous failure to state a fact in circumstances in which that fact naturally would have been asserted" (447 U.S. at 239), but that observation is relevant to *Chen* only insofar as it supports the court of appeals' reasoning. Respondent did not mention his persecution for resistance to family planning in his 1995 asylum application, but that circumstance was plainly not one in which "that fact naturally would have been asserted," since resistance to China's population control policies was not a viable basis for an asylum claim in 1995.

The second discrepancy between the two applications that the BIA cites for regarding Chen as incredible is also immaterial to his asylum claim and explained by record evidence. The BIA correctly notes that respondent marked "single" on his first application, while in his second application, he indicated that he married in 1994, prior to his first arrival in the U.S. Pet. App. 20a-21a. Although the government tries to characterize this discrepancy as central to respondent's asylum application, and therefore probative of his lack of credibility, the record

shows otherwise. Respondent testified that the Chinese government considered his marriage to be illegal, because he and his wife were underage when they married. Yet, despite his government's view, respondent and his wife clearly considered themselves married. E.R. 82, 86. Under such circumstances, respondent reasonably was confused about how he should characterize his marital status on an official government document such as his asylum application. A reasonable adjudicator, cognizant of respondent's circumstances as set forth in the administrative record, would be compelled to conclude that the BIA's finding on this point required reversal.

Further, 8 U.S.C. 1101(a)(42)(B) provides that asylum may be based on persecution the applicant suffered or reasonably fears "for resistance to a coercive population control program." Nowhere does the statute require that an applicant be married or that the applicant's resistance to coercive population control policies occur in the context of marriage. The wording of the statute simply contemplates that asylum can be granted based on resistance to such policies, regardless of whether the applicant is married or not. Consequently, respondent's marking on his second asylum application that he is married does nothing to enhance his claim. For this reason, too, the record compelled reversal of the BIA on the issue of "inconsistent" applications.

*General inconsistency and vagueness:* The court of appeals concluded that the BIA's assertion that respondent's "second application and testimony was * * * inconsistent or vague" was not supported by any "specific, cogent reason." Pet. App. 10a. The BIA's basis for regarding respondent as "inconsistent or vague" was its belief that he testified inconsistently about the location of his wife and son, and that, although the record contains an abortion notice from family planning officials, respondent did not testify about it. Pet. App. 21a.

The record shows no inconsistency or vagueness in respondent's testimony concerning the whereabouts of his

wife and son. Respondent simply stated that his son lives with his family, and that his wife and son "are together." E.R. 83, 84, 114, 128. He also explained that his wife is in contact with his side of the family and had stayed with them, and that she and their son move frequently to avoid apprehension by family planning authorities. *Id.* at 120, 121. This evidence, coupled with the fact that respondent is in the U.S. while his wife and son both remain in China, demonstrates that no contradiction or vagueness exists on this point.

The court of appeals also correctly pointed out that Chen did testify about the abortion notice. Pet. App. 10a. The record shows that when the INS cross-examined Chen about the notice, he responded in a straightforward manner. E.R. 118-119. The court of appeals properly concluded that the BIA's reliance on the abortion notice did not amount to substantial evidence that could support a negative credibility determination. Pet. App. 10a.

6. Having found that none of the bases relied upon by the BIA for its disbelief of Chen was supported by substantial evidence, the court below correctly concluded that the BIA's adverse credibility decision could not stand. The government has failed to show why this ruling warrants a grant of certiorari.

## II. THE DECISION OF THE COURT BELOW NOT TO REMAND ON THE MERITS WHERE THE RECORD CLEARLY ENTITLES RESPONDENT TO RELIEF DOES NOT VIOLATE PRINCIPLES OF ADMINISTRATIVE LAW AND IS CONSISTENT WITH DECISIONS IN OTHER CIRCUITS.

1. Although in the instant case, the court of appeals reversed the BIA, concluding that respondent is entitled to withholding of removal and eligible for asylum, the court remanded to the BIA for the Attorney General to consider the issue of whether respondent qualifies for asylum as a matter of discretion (Pet. App. 15a), thus according the

agency the extra deference due on discretionary questions. While withholding prohibits returning the alien to the country where he has established a clear probability of persecution, it does not bar removal to another country that will accept him, and does not bestow the right to apply for permanent residence and eventually, for citizenship, as a grant of asylum does. *See, e.g., Cardoza-Fonseca,* 480 U.S. at 429 n.6. Remand to the Attorney General for the exercise of his discretion on the question of asylum thus preserves his authority over asylum matters, and given that asylum confers far greater benefits than withholding of removal, also preserves his power more generally over immigration.

2. The court of appeals' decision to grant respondent's application for withholding of removal and determine respondent eligible for asylum comports with the doctrine of primary jurisdiction, which contemplates that a reviewing court will defer "initial decision-making responsibility" to the agency. 2 Pierce, Administrative Law Treatise § 14.1, at 918 (2002). The Ninth Circuit recognizes that courts of appeals reviewing decisions of the BIA do "not sit as an administrative agency for the purpose of fact-finding in the first instance." *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980). Consequently, the Ninth Circuit remands to the BIA when an evidentiary issue necessitates consideration in the first instance by the BIA or IJ. *See Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001). The Ninth Circuit also remands to the BIA where the administrative record is not sufficiently clear to allow judicial review. *See Paramasamy v. Ashcroft*, 295 F.3d 1047, 1054 (9th Cir. 2002) (concluding that a remand to the BIA was appropriate because "this is not a case where we can say with the requisite certainty that the Board would have been unreasonable in denying relief").

Contrary to the government's view, respect for the primary jurisdiction of administrative agencies does not relieve courts of their authority to review and reverse final agency determinations. A court may award relief denied by an agency rather than remanding if "the underlying law

and facts are such that the agency has no discretion to act in any other manner," and remand to the agency would merely "further delay . . . the action to which the petitioner is clearly entitled." 3 Pierce, Administrative Law Treatise § 18.1, at 1324 (2002) citing *Faucher v. Secretary of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994) (court may reverse agency decision and award requested relief "if all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." *See also Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001) (court could order relief without remand "if the evidence and law compelled" such a conclusion)); *Hutsell v. Massanari,* 259 F.3d 707, 714 (8th Cir. 2001); *Davis v. Shalala*, 985 F.2d 528, 534 (11th Cir. 1993); *Ivy v. Sullivan,* 898 F.2d 1045, 1049 (5th Cir. 1990); *Harris v. Secretary of Health and Human Servs.*, 821 F.2d 541, 545 (10th Cir. 1987); *Mowerey v. Heckler*, 771 F.2d 966, 973 (6th Cir. 1985). The court of appeals followed this well-established principle in *Chen*. Having determined that the BIA's adverse credibility determination was not supported by substantial evidence, the court reviewed "the complete administrative record" to determine whether it "would be compelled to reverse [the BIA] decision" denying relief and therefore, whether remand to the BIA was unnecessary. Pet. App. 10a. This process did not require the court of appeals to "render[] its own findings of fact" (Pet. 21) or raise questions "in the first instance" (Pet. 20) since as the government acknowledges, the IJ already considered the merits of respondent's claims if his testimony were deemed credible (Pet. 26). The BIA, moreover, held "that the evidence presented does not satisfy the applicable burden of proof for either asylum or withholding of removal under the Act." Pet. App. 24a. The agency created a complete administrative record, 275 pages long, on which the court of appeals relied to make a final determination, thus fulfilling the purpose of the primary jurisdiction doctrine: to allow an agency to render the initial determination on the issues in the case.

The government's reliance on *Port of Portland v. United States*, 408 U.S. 811, 842 (1972), *Nader v. Allegheny Airlines Inc.*, 426 U.S. 290, 303-304 (1976), and *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) is inapposite because *Chen* did not require the resolution of new facts or "issues the agency did not consider." (Pet. 21).[6] Accordingly, the government's position that the court of appeals conducted a de novo review of the agency's decision is also without foundation. Judicial review of an administrative decision requires consideration of "all of the evidence in the record as a whole, not just the evidence that is consistent with the agency's finding." 2 Pierce, Administrative Law Treatise §11.2 at 772 (2002). *See also Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488-90 (1951). Consistent with this precept, and because no issues remained for which the agency needed to make an initial determination, the court of appeals reviewed the agency's determination in light of the entire record, and found that respondent was entitled to withholding of removal and eligible for asylum.

3. Although the government characterizes the administrative record as "bare" (Pet. 24), it is vague as to what exactly is missing. The government seems to suggest that a remand is necessary for the agency to reconsider whether: the presumption that respondent has a well-founded fear of persecution has been rebutted; he was

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[6] The government's assertion (Pet. 21) that the court of appeals' approach runs afoul of this Court's decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) is without merit. This Court's analysis in *Lorion* focused on why the court of appeals, rather than the district court, had jurisdiction to review a determination by the Nuclear Regulatory Commission. In the course of this discussion, the Court recited a basic tenet of judicial review of agency action, namely, that remand to the agency is the ordinary course of action. But nowhere does *Lorion* address the circumstances in which remand would not be the proper course of action, probably because the issue of whether or not to remand to the agency was not central to the court's holding. *Id.*

pursued, detained, and beaten for reasons other than his resistance to coerced family planning; based on "information about the conditions" in China, "prospective from the date of the court's decision," relief would still be warranted (Pet. 24-27). But the court of appeals did not rely on the rule that past persecution creates a rebuttable presumption of future persecution. *See* Pet. App. 14a ("Notwithstanding this presumption, we also find that Chen meets the subjective and objective elements of proving his well-founded fear"). Further, the government has not argued that there is new information that might establish a fundamental change in circumstances in China's population control policy such that respondent would no longer have a well-founded fear or clear probability of persecution, and seems unlikely to do so now, given the government's present stand on that issue. *See infra,* at 27-28. The government's position that the Attorney General must be given an opportunity to address an applicant's fear of future persecution prospectively from the date of the court's decision, would create a never-ending loop of judicial review from which an asylum applicant could never escape. For *any* time a court of appeals reverses a BIA decision denying withholding of removal, the Attorney General could argue that since relief from removal "is inherently prospective in nature" (Pet. 25) the case must be remanded to the BIA for further consideration. *See Nelson v. United States*, 64 F. Supp. 2d 1318, 1326 (N.D. Ga. 1999) (If an agency were entitled to a "second bite at the apple" every time it made an erroneous decision, "administrative law would be a never ending loop from which aggrieved parties would never receive justice," quoting *McDonnell Douglas Corp. v. National Aeronautics & Space Corp.*, 895 F. Supp. 316, 319 (D.D.C. 1995); *cf. INS v. Abudu,* 485 U.S. 94, 107 (1988) ("There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving adversaries a fair opportunity to develop and present their respective cases.").

4. The government's claim that there is "no direct evidence" that respondent was beaten and pursued because of his resistance to family planning policies (Pet. 8, 26-27) is inapposite. This Court does not require "direct evidence" of motive for persecution; only "some evidence, direct or circumstantial" must be presented. *Elias-Zacarias,* 502 U.S. at 483. Here, the record clearly shows that: respondent was pursued by family planning authorities (E.R. 86-91, 102, 122-127, 200, 218); such authorities frequently inflict harsh punishments on individuals who have resisted forced population control, including detention and beating (*Id.* 176-193, 269-275); and Chinese officials detained and severely beat respondent when INS returned him. *Id.* 95-99; 129. Equally unavailing is the government's position that "a reasonable inference might be that respondent was punished in Shanghai for leaving China illegally."(Pet. 27). The government provides no cite in the record to support this position, and in any event, illegal departure combined with other manifestations of defiance of government authorities can give rise to persecution on account of political opinion. *See* E.R. 106; *Chang v. INS*, 119 F.3d 1055, 1062-65 (3rd Cir. 1997). The government's assertion that the record does not show that the authorities wanted to detain respondent in 1995 because of his wife's pregnancy (Pet. 26-27) is also wrong. Respondent's testimony (E.R. 86-91, 102, 122-127), his wife's abortion notice (*Id.* 220), and corroborating country conditions information is strong evidence that resistance to forced family planning was the motive for the government's pursuit.

As contemplated by this Court in *Elias-Zacarias,* the administrative record in the instant case contains compelling circumstantial evidence that Chinese authorities persecuted respondent on account of his challenges to Chinese policies, including coerced population control; that a reasonable person in respondent's circumstances would fear persecution; and that a clear probability of such persecution exists in the future. Because a reasonable person in respondent's circumstances would fear this persecution, any

reasonable adjudicator would be compelled to conclude that, contrary to the BIA's decision in this case, respondent is eligible for asylum and entitled to withholding of removal.

5. The government's suggestion that a "new, independent determination regarding withholding of removal" (*id.* at 22) is necessary because an applicant must meet a higher standard of proof for withholding than for asylum eligibility is without foundation. The IJ evaluated respondent's claims for withholding of removal and asylum eligibility, so the administrative record before the court of appeals was complete with respect to both claims. Moreover, both claims are based on the same set of facts, and therefore no additional fact-finding would be necessary in order to consider the withholding of removal claim. The government's position is further belied by this Court's decision that "those who can show a clear probability of persecution are *entitled* to mandatory suspension of deportation and are *eligible* for discretionary asylum." *Cardoza-Fonseca*, 480 U.S. at 444 (emphasis in original).[7] *See also INS v. Doherty,* 502 U.S. 314, 332 (1992) (Scalia, J. concurring/dissenting) ("Because of the mandatory nature of the withholding-of-deportation provision, the Attorney General's

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[7] In this regard, the government's reliance on *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952), is misplaced. *Idaho Power Co.* addressed a situation where an appellate court, after finding that the Federal Power Commission (FPC) had improperly attached conditions to a license, instead of remanding, ordered the agency to issue the license without the conditions. *Id.* at 20. This Court stated that such an action usurped an important administrative function, because it precluded the Commission from considering whether an alternative course, such as withholding consent to any license, might better fulfill its mandate to coordinate and oversee energy development. *Id.* Here, no comparable problem exists, because where a respondent shows a clear probability of persecution, the only alternative to withholding is asylum, and the court remanded to the Attorney General the question of whether asylum should be granted as a matter of discretion.

power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum. . . . ").

6. The government cites several cases for the proposition that the Ninth Circuit purportedly "makes its own findings and usually awards withholding * * * [and] sometimes seeks to justify its award of relief by invoking the presumption of future persecution that arises by regulation in administrative proceedings when there has been a finding of past persecution," or by rendering "its own assessment in the first instance of the evidence and its weight." Pet. 22-23. But in *Chen*, the court below neither made its own findings, nor assessed the evidence in the first instance. Instead, it reviewed the administrative record and the findings of the BIA. *See* Pet. App. 4a. Nor did it rely on a presumption of future persecution simply because respondent had been persecuted in the past. *See supra,* at 19. Consequently, *Chen* is not a suitable vehicle for the government to challenge these other Ninth Circuit cases.

7. The Ninth Circuit declines to remand an asylum case only where: the agency had the first opportunity to consider the key factual and legal issues; there is a complete administrative record; and, "on the record * * * it is clear that [the court] would be compelled to reverse [the BIA's] decision if it had decided the matter against the applicant." *Navas v. INS,* 217 F.3d 646, 662 (9th Cir. 2000). This approach is consistent with the practices of other circuits. The Third Circuit, for example, has adopted the view that no remand to the BIA is necessary where a reasonable fact-finder would be compelled to conclude that the asylum applicant has established his or her claims. Thus, in *Chang,* 119 F.3d 1055, the court reversed a BIA decision denying asylum and withholding of deportation, declining to remand the case to the BIA. The court noted that the scope of review of a BIA decision denying asylum and withholding is narrow *(id.* at 1060), and that reversal is proper "only if a reasonable fact-finder would be forced

to conclude that [the applicant] has shown the requisite fear of persecution." *Id.* at 1065-66 (citing *Elias-Zacarias,* 502 U.S. at 481). After reviewing the administrative record, paying particular attention to those aspects related to the BIA's reasons for denying the relief requested, the court determined that *Chang* presented such a situation, and accordingly, reversed the BIA and granted withholding of removal and eligibility for asylum. 119 F.3d at 1068. *See also Li Wu Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001) (reversing BIA decision "wholly unsupported by the record," and concluding that applicant "satisfied both the standards for political asylum and those for withholding of deportation"); *Ezeagwuna v. Ashcroft*, No. 01-3294, 2002 U.S. App. LEXIS 15278 (3d Cir. July 30, 2002) (overturning the BIA's adverse credibility determination, and reversing the BIA's denial of asylum on the merits and withholding because based on the administrative record, a reasonable fact-finder would be compelled to do so). Similarly, in *Fergiste v. INS*, 138 F.3d 14, 20 (1998), the First Circuit reversed a decision by the BIA denying asylum and withholding, and concluded that a remand for further fact-finding was "not necessary in this case," because the record below justified an immediate grant of relief.

8. The cases the government cites in support of its proposition that the Ninth Circuit's decision in *Chen* conflicts with other circuits (Pet. 27) differ from the present case in crucial respects that made remand appropriate in those cases. In *Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002), after reversing the BIA's denial of asylum, the court remanded because of a specific deficiency in the record that required development by the agency. The court found that "[t]he BIA in 1998 affirmed a 1994 decision of the IJ predicated primarily on a 1993 State Department Country Report." *Id.* at 163. In deciding to remand Yang's case to the BIA, the court emphasized "the significant time gap between the 1993 State Department Country Report and the time of the proposed deportation," and the fact that the agency's denial of asylum centered on country

conditions evidence regarding treatment of dissidents that was more than eight years old. *Id.* Similarly, in *Begzatowski v. INS*, 278 F.3d 665, 671-72 (7th Cir. 2002), the court reversed the BIA's conclusion that the applicant had not suffered persecution in Macedonia, but remanded to the BIA to consider whether the applicant's fear of future persecution was rebutted by recent State Department reports on changed country conditions in the seven years since the applicant's initial request for asylum.

*Chen* differs from *Yang* and *Begzatowki* in several ways. In *Chen,* country conditions evidence in the record, submitted in April 1999, includes documents published in 1998 and 1999. E.R. 169-275. Consequently, the time lag between the date of this evidence, the BIA's decision in April 2000, and the court of appeals' ruling in September 2001 is not nearly as great as in either of those cases. Unlike in *Yang*, in *Chen*, the agency did not primarily base its denial of asylum on country conditions information, referring only incidentally to "State Department reports" (Pet. App. 56a). And, in contrast to both *Yang* and *Begzatowski*, the administrative record in *Chen* contains evidence still central to respondent's asylum claim, namely, testimony at Congressional hearings in 1998 confirming that Chinese authorities persist in severe persecution of persons who resist official population control policies by flouting the age requirement for marriage and then seek to have a child. E.R. 181-187. Particularly in light of recent findings by the Executive branch that Chinese officials clearly continue to use "coercive elements in law and practice" against those who resist population control policies (*see infra*, at 27-28), remand to the BIA for current country conditions evidence is not necessary in the instant case.

In *Alvarado-Carillo*, 251 F.3d at 56, the court reversed the BIA's adverse credibility determination and remanded because the applicant had not had the opportunity "to address * * * items raised sua sponte in the BIA Opinion," which would have rendered him ineligible for asylum –

again, a concern not at issue in *Chen*. *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999) involved an entirely different proceeding from the one presented here: a motion to reopen deportation proceedings to apply for adjustment of status based on the applicant's marriage to a United States citizen. In affirming the BIA's decision to deny the applicant's motion, the court noted that if it were to reverse the BIA's decision, it would remand the case to the BIA for first consideration of the merits of the application (*id.* at 595 n.6), an approach that has nothing to do with review of a denial of an asylum application, especially where, as here, the agency has already considered the issues, and the court's review relied on a complete agency record. In *Gailius*, 147 F.3d 34, the court remanded after reversing the BIA because the IJ and the BIA "failed to address much of [the] evidence" or even make a "determination of credibility" in the first instance. *Id.* at 47. In the instant case, the agency considered the evidence marshaled by respondent and made a credibility determination that the court of appeals could review. The passage cited by the government from *Rhoa-Zamora v. INS*, 971 F.2d 26 (7th Cir. 1992) is also inapposite. While the *Rhoa-Zamora* court did announce that it "will not weigh evidence that the [BIA] has not previously considered," it did so in response to the applicant's request that the court consider new evidence never presented to the BIA. *Id.* at 34. In *Chen*, by contrast, the court of appeals could (and did) base its decision on evidence already in the agency record.

9. The application of the primary jurisdiction doctrine to require remand in this case would be especially inappropriate in light of the harm to respondent. *See National Communications Ass'n v. AT&T*, 46 F.3d 220, 223 (2d Cir. 1995) ("A court should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate."). *See also Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir. 1999). Contrary to the

government's implication that respondent would not suffer from the delay created by a remand on the merits (Pet. 25), remand would virtually guarantee that he would still be detained, causing him harm as well as significant unnecessary expense to the government. An INS district director is accorded nearly complete discretion to detain arriving aliens, such as respondent, without bond, particularly once an order of removal has been entered. *See, e.g.*, 8 C.F.R. 235.3(4)(ii); 236.1; 241.4. Here, the INS detained respondent from his arrival in 1998 until October 24, 2001, releasing him only after the court of appeals granted withholding of removal. INS Order of Release (Resp. App. 17a) (indicating that the INS released respondent because the court of appeals granted him withholding).

10. The government maintains, incorrectly, that the court of appeals erred in reversing the instant case without remand, because the decision "may implicate a determination of policy or judgment which the agency alone is authorized to make." Pet. 24, citing *SEC v. Chenery*, 318 U.S. 388. Similarly, the government alleges that the decision threatens "foreign affairs, national defense, and [the government's power over] defining the national community" (Pet. 21) by usurping "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 28 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). The government's characterization of the court of appeals' role in this case is inapt. The court granted respondent's application for withholding of removal and found him eligible for asylum pursuant to its authority under 8 U.S.C. 1252, in which Congress specifically contemplated judicial review of BIA determinations in asylum cases, and 8 U.S.C. 1101(a)(42)(B), in which Congress determined that resistance to coercive population control policies is a ground for asylum. While this Court generally disfavors reversals of BIA decisions that may implicate foreign policy issues traditionally in the realm of the executive, such a concern is misplaced here. When it enacted the IIRIRA in 1996, Congress explicitly provided that an

individual persecuted for "resistance to a coercive population control program" is considered a "refugee" eligible for asylum. 8 U.S.C. 1101(a)(42)(B). This statutory change, which overruled the BIA's 1989 holding that China's "one family-one child" policy was not persecutory on its face (*Matter of Chang*, 20 I. & N. Dec. 38), was prompted by extensive evidence gathered at congressional hearings on China's coercive population control policies. *See Coercive Population Control in China: Hearings Before the Subcomm. on the Int'l Operations & Human Rights of the House Comm. on Int'l Relations*, 104th Cong. (1995); 142 Cong. Rec. 6008 (1996) (describing China's forced abortion and forced sterilization practices as among the "most gruesome human rights violations"); *Zhao v. United States Dep't of Justice*, 265 F.3d 83, 91-93 (2d Cir. 2001).

Substantially similar findings recently led the Administration last month to conclude that the United States is precluded from making contributions to the United Nations Population Fund (UNFPA) by the Kemp-Kasten amendment, which provides that no funds may be given to any organization which "supports or participates in the management of a program of coercive abortion or involuntary sterilization" (Pub. L. No. 107-115), because of UNFPA's operations in China. *See* U.S. Dep't of State, *Press Statement: FY 2002 Funding for the UN Population Fund* (July 22, 2002). This conclusion was based on the report of an assessment team that traveled to China in May 2002 at the request of the Secretary of State, and concluded that "China's population practices," which "retain coercive elements in law and in practice," amount to a "program of coercive abortion," and that the Chinese government "has recently confirmed these kinds of policies on a national basis." Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Analysis of Determination that Kemp-Kasten Amendment Precludes Further Funding to UNFPA under Pub. L. 107-115* (July 18, 2002). The case at bar thus presents the unique situation of a refugee whose grounds for seeking withholding of removal and asylum have been explicitly confirmed based on findings by both

the Legislative and Executive Branches. A less apt candidate for remand for "a determination of policy or judgment" (Pet. 24) by the Executive is difficult to imagine.[8]

11. The government seeks to persuade this Court that there is a crisis in the Ninth Circuit which "compromises enforcement of the immigration laws." Pet. 29. Yet, in addition to the irrelevance of this argument to the case at bar, government statistics and other pertinent data show that no such crisis exists. According to the government, EOIR has calculated that its adjudicators complete 50,000 to 75,000 asylum cases annually, of which approximately one-third arise in the Ninth Circuit (Pet. 29), i.e. roughly 17,000 to 25,000 – or an average of 21,000 cases. The government states that the Ninth Circuit decided 333 asylum cases in FY 2001, but does not identify a specific source for that data. Pet. 21. These 333 asylum cases would roughly amount to only 1.6% of 21,000 cases. Using Lexis and Westlaw, respondent has only been able to identify 188 reported and unreported asylum decisions by the Ninth Circuit in FY 2001. A review of those decisions demonstrates that 75% of the time (in 133 out of 188 cases), the Ninth Circuit affirmed the BIA. The court reversed without remanding on the merits in only 28 cases (15% of 188), and, in each of these, remanded to the BIA to exercise its discretion whether or not to grant asylum. Twenty-eight cases would represent only 0.1% of the 21,000 asylum cases "that occur[red] within the Ninth Circuit" (Pet. 21) in FY 2001. Such a small percentage

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[8] The other cases cited by the government, *Fiallo v. Bell*, 430 U.S. 787 (1977), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952), are also irrelevant here. Those cases involved the deference the judiciary affords Congress in assessing the constitutionality of immigration laws. *Chen* does not involve a challenge, constitutional or otherwise, to the authority of Congress over immigration laws.

neither undercuts the enforcement of immigration laws, nor warrants this Court's intervention.

12. The present case establishes that the court below applied the proper standard of review, one entirely consistent with other circuits, and with principles of primary jurisdiction and deference to the agency. Accordingly, as with the question of credibility, this Court should deny the petition for a writ of certiorari on the issue of remand.

At most, the government's reliance on a purported principle of administrative law that the courts must always remand cases to administrative agencies rather than granting relief outright would only establish that *Chen* should be held pending this Court's resolution of *United States v. Bean*, No. 01-704. In *Bean*, the government contends that if a federal court reverses the Bureau of Alcohol, Tobacco and Firearms' refusal to reinstate an individual's firearms rights, the matter must be remanded to the agency. The government rests this argument on the identical authorities – *e.g.*, *Florida Power & Light Co. v. Lorion* and *FPC v. Idaho Power Co.* – that it invokes in its petition in this case. *See generally* 01-704 Reply Br. 5-7. As such, this Court's decision in *Bean* would have a significant influence on the outcome of the question regarding remand in *Chen*.

## CONCLUSION

The petition for a writ of certiorari should be denied, or in the alternative, this case should be held pending this Court's decision in *U.S. v. Bean*.

Respectfully submitted,

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August 2002

# APPENDIX A

## REGULATORY PROVISIONS INVOLVED (IN ADDITION TO STATUTORY AND REGULATORY PROVISIONS CITED IN PETITION APPENDIX E)

1. Section 208.13 of Title 8 of the Code of Federal Regulations provides as follows:

**§ 208.13 Establishing asylum eligibility.**

**(a) Burden of proof.** The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

**(b) Eligibility.** The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

**(1) Past persecution.** An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such

past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

> **(i) Discretionary referral or denial.** Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:
>
> > **(A)** There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or
> >
> > **(B)** The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the

circumstances, it would be reasonable to expect the applicant to do so.

**(ii) Burden of proof.** In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

**(iii) Grant in the absence of well-founded fear of persecution.** An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

**(A)** The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

**(B)** The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

**(2) Well-founded fear of persecution.**

**(i)** An applicant has a well-founded fear of persecution if:

**(A)** The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality,

membership in a particular social group, or political opinion;

**(B)** There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

**(C)** He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

**(ii)** An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

**(iii)** In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

**(A)** The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion,

nationality, membership in a particular social group, or political opinion; and

**(B)** The applicant, establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

**(3) Reasonableness of internal relocation.** For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

**(i)** In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

**(ii)** In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the

circumstances, it would be reasonable for the applicant to relocate.

* * *

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2. Section 208.16 of the Code of Federal Regulations provides as follows:

**§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.**

**(a) Consideration of application for withholding of removal.** An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

**(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.** The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

**(1) Past threat to life or freedom.**

**(i)** If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

> **(A)** There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or
>
> **(B)** The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

**(ii)** In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

**(iii)** If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the

burden of establishing that it is more likely than not that he or she would suffer such harm.

**(2) Future threat to life or freedom.** An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

**(i)** The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

**(ii)** The applicant establishes his or her own inclusion in and identification with

such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

**(3) Reasonableness of internal relocation.** For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serous harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

**(i)** In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

**(ii)** In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

**(c) Eligibility for withholding of removal under the Convention Against Torture.**

**(1)** For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

**(2)** The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

**(3)** In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including but not limited to:

**(i)** Evidence of past torture inflicted upon the applicant;

**(ii)** Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

**(iii)** Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

**(iv)** Other relevant information regarding conditions in the country of removal.

**(4)** In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

**(d) Approval or denial of application.**

**(1) General.** Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

**(2) Mandatory denials.** Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under

section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability for one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

**(3) Exception to the prohibition on withholding of deportation in certain cases.** Section 243(h)(3) of the Act, as added by section 413 of Pub.L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in

this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

**(e) Reconsideration of discretionary denial of asylum.** In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

* * *

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3. Section 208.18 of the Code of Federal Regulations provides as follows:

**§ 208.18 Implementation of the Convention Against Torture.**

**(a) Definitions.** The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or

mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

**(2)** Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

**(3)** Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

**(4)** In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

> **(i)** The intentional infliction or threatened infliction of severe physical pain or suffering;
>
> **(ii)** The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

**(iii)** The threat of imminent death; or

**(iv)** The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

**(5)** In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

**(6)** In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

**(7)** Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

**(8)** Noncompliance with applicable legal procedural standards does not per se constitute torture.

* * *

**(e) Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.**

**(1)** Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of

removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

**(2)** Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

[64 FR 8490, Feb. 19, 1999; 64 FR 13881, March 23, 1999]

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## APPENDIX B

[LOGO] **U.S. Department of Justice**
Immigration and Naturalization Service

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*2035 North Central Avenue*
*Phoenix, Arizona 85004*

**Oct. 24, 2001**

Monica Schurtman, Esquire
University of Idaho College of Law
Legal Aid Clinic
6th and Rayburn
Moscow, Idaho, 83844-2322

Dear Ms. Schurtman:

This is in response to your letter dated October 11, 2000, requesting the District Director to review Yi Quan Chen's case for consideration of release based on the decision rendered by the United States Court of Appeals for the Ninth Circuit.

Mr. Chen is a citizen and national of China who initially applied for admission into the United States on April 2, 1995, at the Miami International Airport with an altered Korean passport. Mr. Chen was subsequently ordered excluded from the United States and was removed from the United States to China on May 13, 1996.

Mr. Chen then attempted to re-enter into the United States on September 18, 1998, when the vessel he was a passenger in was interdicted in international waters by the United States Coast Guard. Because Mr. Chen was interdicted in international waters and brought into the United States, he is an arriving alien.

On June 7, 1999, an Immigration Judge ordered Mr. Chen deported, denied his application for asylum, his application for withholding of removal and relief under the torture convention. Mr. Chen then reserved his right to appeal the Immigration Judge's decision.

On September 24, 1999, Mr. Chen's request for a change of custody status was denied when the Immigration Judge found that Mr. Chen was an arriving alien and was therefore not eligible for a bond. Mr. Chen then appealed this decision to the Board of Immigration Appeals (BIA). On February 2, 2000, the BIA affirmed the Immigration Judge's decision that Mr. Chen is an arriving alien and is not eligible for a bond.

On April 10, 2000, the BIA dismissed Mr. Chen's appeal challenging the Immigration Judge's June 7, 1999, decision.

On April 16, 2000, Mr. Chen filed for and was granted a Stay of Deportation with the Ninth Circuit Court of Appeals.

On September 11, 2001, the United States Court of Appeals for the Ninth Circuit found Mr. Chen eligible for a discretionary grant of asylum and a mandatory grant of withholding of removal.

Based on these facts I am granting your request to release Mr. Chen under an order of supervision.

Sincerely,

/s/ Thomas M. Baranick
Thomas M. Baranick
Assistant District Director
Detention and Removal Operations